

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,882

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Appeal of)

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INTRODUCTION

The petitioner moves to reopen an Order of the Human Services board dismissing his appeal. The issue is whether the petitioner has set forth sufficient grounds to have his appeal be reconsidered.

FINDINGS OF FACT

On February 27, 1997, the board received notice that the petitioner had appealed a decision by the Department of Social Welfare denying him coverage under VHAP for a CAT scan.

On February 28, 1997, the Board mailed the petitioner a notice scheduling a hearing on his appeal for March 7, 1997.

The petitioner did not appear at the hearing and did not contact the Board or the Department as to his failure to appear.

On March 13, 1997, the Board mailed the petitioner a letter (pursuant to Fair Hearing Rule No. 14, see infra) instructing him to contact the Board within 10 days⁽¹⁾ or else his appeal would be dismissed.

Having heard nothing from the petitioner, on April 14, 1997, the Board entered an Order dismissing the petitioner's appeal.

On April 21, 1997, the Board received a letter from the petitioner stating that he "misunderstood the process" and asking the Board to "reconsider" his case.

At a hearing on the petitioner's request for reconsideration, held on May 9, 1997, the petitioner alleged that he had a back problem and that his doctor had recommended that he undergo a CAT scan for purposes of diagnosis. The Department's records indicated that the request was denied under VHAP because, in the Department's view, there had not been a long enough trial period of conservative treatment.

The petitioner alleged that on February 24, 1997 (a few days after appealing the decision of non-coverage) he underwent an MRI on his own initiative and expense. Medical records submitted by the

petitioner show that the test revealed a herniated disc for which the petitioner is receiving ongoing treatment (which appears to be covered by VHAP).

The petitioner requests that his case be reopened to consider payment for the MRI. The petitioner does not allege any basis for reopening the matter other than his own "misunderstanding" and preconceptions about the appeal process that led him to decide not to appear at his initial hearing and not to respond to the notices that were sent to him after his failure to appear. The petitioner does not allege that anyone at the Department, or anyone else, was the source of any misunderstanding or preconception he may have had.

ORDER

The petitioner's request to reopen this matter is denied.

REASONS

Fair Hearing Rule No. 14 provides as follows:

14. Failure to appear. If neither the appellant nor his or her representative appears at the time and place noticed for the hearing, the clerk shall inquire by mail as to what caused the failure to appear. If no response to this inquiry is received by the agency or the hearing officer within 7 working days of the mailing thereof, or if no good cause is shown for the failure to appear, the board may dismiss the appeal at its next regular meeting.

There is no question in this matter that the Board's action in dismissing the petitioner's appeal was in accord with the above Rule.

Although the Board has held that it, as any administrative body, has the "inherent power" to vacate its own orders, it has done so on a case by case basis only when it has determined that it is "when justice requires". See Fair Hearings No. 9,403 and 11, 281. In deciding whether to reopen cases the Board has looked to Rule 60 of the Vermont Rules of Civil Procedure (VRCP) for guidance:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

In Fair Hearing No. 9,403, the Board reopened a medicaid disability case when subsequent medical evidence was submitted showing that a previously undiagnosed medical condition supported a claim of disability that had been rejected by the Board on the basis of the petitioner's testimony. In Fair Hearing No. 11,281 an appeal that had been dismissed because the petitioner had failed to respond to a request

for a showing of good cause for failure to attend a scheduled hearing was reopened when subsequent evidence showed that the petitioner did, in fact, contact the Board and the Department on the day of her hearing to report that she was ill, and that she then failed to receive the notice asking her to offer good cause within ten days or face dismissal.

The circumstances in the instant matter do not approach the level of "good cause" found in the above-cited cases. In this case the petitioner filed his appeal and then, based solely on unwarranted assumptions regarding his prospects for success at the hearing, essentially ignored the subsequent notices of hearing and request for a showing of good cause. It is concluded that this "misunderstanding" does not arise to "excusable neglect" or "any other reason justifying relief" as contemplated by VRCP 60, supra. Therefore, the petitioner's request to reopen this matter is denied.

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1. Rule No. 14 was amended in October, 1995, reducing the time of a petitioner's response from 10 to 7 days. The Board, through oversight, was still using a form letter drafted prior to the amendment of the Rule. This oversight did not prejudice the petitioner, and the Board has now amended its form letters to conform to the rule.